92-1598

No._____

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

THOMAS W. CURLEY,
Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION and
EXCELSIOR TRUCK LEASING COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Assuming arguendo that the statement in Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351, at 354-355 (1930), that in a FELA case the jury "may not be permitted to speculate as to [the cause of the plaintiff's injury] and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer" was ever a totally accurate statement of FELA causation law, in light of this Court's post-Toops decisions dealing with sufficiency of evidence and the role of the jury in FELA cases, see, e.g., Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) (collecting and discussing cases), is the portion of this statement in Toops relating to "speculation" still good law?

2. In this case did the New York Court of Appeals effectively defy the doctrine of Federal Supremacy (see United States Constitution, Article VI, Clause 2, and Article III, Section 1) when it held, purporting to rely on Toops, that the jury verdict in the petitioner's favor was required to be vacated and his complaint dismissed, based on the stated ground that the jury's finding that petitioner's injury had been caused by the respondent railroad's negligence had to have been based on "total speculation," where, in so holding, that court apparently deliberately ignored this Court's numerous post-Toops decisions which appear plainly to establish that the evidence on causation in this case was in fact entirely sufficient?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

OPINIONS BELOW

The decision and order of the New York Court of Appeals here sought to be reviewed is reported at 80 N.Y.2d 746, ____ N.Y.S.2d ____, ____ N.E.2d ____. The opinion of the Appellate Division of the New York Supreme Court is reported at 178

A.D.2d 318, 578 N.Y.S.2d 536. A prior Appellate Division order is reported at 155 A.D.2d 283, 547 N.Y.S.2d 552.

JURISDICTION

The order here sought to be reviewed was entered on December 21, 1992. By order entered February 25, 1993, the Court of Appeals denied petitioner's timely motion for reargument. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article III, Section 1:

> The judicial Power of the United States, shall be vested in one supreme Court . . . .

Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be

> made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

45 U.S.C. Section 51:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . .

STATEMENT OF THE CASE

In this action the petitioner seeks to recover damages for serious and permanently disabling back injuries he claims to have suffered on the evening of March 6, 1984, when, while he was employed by the respondent Consolidated Rail Corporation ("Conrail") as a railroad police officer and was driving a Conrail police car, the car came to a sudden and unexpected stop, causing him

to be violently thrown forward and across the car seat.

The car was a 1981 Ford, owned by respondent Excelsior Truck Leasing Company ("Excelsior"), which had been leased to Conrail for a two year period beginning in July, 1981. As of the date of petitioner's claimed injury, which was approximately eight months beyond the expiration of the original two year lease term, in addition to this car having been kept in service longer than was Conrail's usual practice, it had been driven at least 164,000 miles and more likely in excess of 264,000 miles. It was in constant need of repairs.

While he had been on patrol on the evenings immediately preceding this incident, petitioner had noticed that the car was making strange noises, seemingly coming from the area of the rear axle,

which he had reported on the daily vehicle record. He asked the day officer to take the car into the shop to have it checked, but the day officer refused.

Another officer who used this car testified that a year earlier he had experienced a problem with the car's suddenly losing power and stopping and that in the period just prior to the petitioner's accident he had noticed a recurrence of this problem. On the morning of March 5, 1984, the day before the petitioner's accident, this officer had complained of the way the car was acting to their supervising captain. The captain's response was, like the response to this officer's complaints of a year earlier, that the officers had to work with the equipment they were given.

On its case Conrail called both the service manager of the Ford dealership

where the car was taken the day after this incident and a Ford Motor Company engineer to establish that the car could not have stopped in the way that the petitioner claimed it had.

Despite their direct testimony supportive of Conrail's position, on cross-examination both witnesses made critical concessions indicating that this accident could well have occurred as petitioner claimed. Thus, the service manager admitted that the sudden stopping of the car could have been caused by pieces breaking off and jamming in the differential or in the transmission, or the emergency brake having accidentally engaged. He admitted that he had not inspected the transmission or the emergency brake cable. Moreover, his testimony as to the procedures followed when the differential was inspected

indicated that he had not been present when the differential was being taken apart and drained, and thus he could not testify as to what damaged parts might have been observed when this work was done.

The Ford engineer testified that 150,000 miles on a police car would be harder miles than normal driving and that such use would cause parts to wear out faster. He also testified that between the rear axle assembly, the braking system, the drive shaft and the transmission there would be "hundreds of parts" which would suffer wear through operation, that at 150,000 miles there would be substantial wear, that 250,000 miles would be "very high," and that between 150,000 and 250,000 miles parts would constantly be getting worn out and breaking. He specifically conceded that

if a part had broken off and jammed in the gears of the differential, this could have caused the car to act as petitioner claimed it had.

There was also evidence that Conrail did not have any policy with respect to retiring from service cars which had excessive mileage or were no longer fit for police use and that petitioner's supervisor had been negligent with respect to monitoring the condition of the cars being used by his men.

At trial petitioner conceded that he could not identify the precise cause of the car's having acted as he claimed it had. Nonetheless, he urged, it was fair to infer that this had been caused or contributed to by Conrail's negligence in, inter alia, keeping this car in service for the extremely long period it did and/or its failures to check out the

complaints which had been made just before his accident.

The jury was instructed, in accordance with this Court's decision in Rogers v. Missouri, Pac. R. Co., 352 U.S. 500, at 506, reh. denied, 353 U.S. 943 (1957), that, if it found that Conrail had been negligent, it was sufficient to allow it to find that such negligence had caused petitioner's injury if it found that this negligence played any part, even the slightest, in producing plaintiff's injury (Trial Tr. 1306-07). The jury found that Conrail had been negligent and that its negligence had caused petitioner's injury. It found that petitioner had not been negligent. It further found that Excelsior had not been negligent and had not breached its contract with Conrail. The trial court entered judgment against

Conrail and in favor of the petitioner (and Excelsior) based on this verdict.

On appeal to the Appellate Division, as against petitioner Conrail limited its appeal to its contention that, based on various claimed trial errors and the "weight of the evidence," it was entitled to a new trial. It did not urge that petitioner's complaint must be dismissed for insufficient evidence. However, the Appellate Division majority sua sponte determined that the evidence on causation was insufficient, and on this ground it ordered the complaint dismissed. As support for this holding it cited this Court's decision in Atchison, Topeka & Santa Fe Ry. Co. v. Toops, 281 U.S. 351 (1930), where this Court had stated, using very broad language, that a FELA jury "may not be permitted to speculate" as to the causal connection between the

employer's negligence and a plaintiff's injury. See 281 U.S., at 354-355.

In it opinion the Appellate Division was somewhat ambiguous as to whether its holding was in fact based on its cited concern with "speculation" or, instead, on its evident doubt as to petitioner's credibility concerning how his injury had occurred. Thus, at one point the court appears to have based its holding on what it perceived as inconsistencies in petitioner's testimony (see A29). On the other hand, the court's opinion may also be read as having been based on the court's having accepted Conrail's argument that petitioner was required to establish the precise mechanical condition or defect which had caused the car to malfunction (see A29-30; see also Conrail's Appellate Division Appellant's Brief at pp. 6 and 12-14).

The dissenting justice in the Appellate Division was of the view that petitioner had made out a prima facie case. He also suggested that the majority's decision was based upon a "negative appraisal of the weight of the evidence" (A35).

In the Court of Appeals, petitioner urged that the Appellate Division's reliance upon Toops' statement concerning speculation had been misplaced in light of this Court's later decisions in cases such as Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963), Webb v. Illinois Central R. Co., 352 U.S. 512 (1957), Schulz v. Pennsylvania R. Co., 350 U.S. 523 (1956), and Lavender v. Kurn, 327 U.S. 645 (1946), all of which had specifically recognized that some measure of speculation must be allowed to a jury in cases of this type and all of

which, petitioner urged, squarely supported his contention that in this case the evidence on causation was entirely sufficient. Moreover, he urged, the critical issue in this case was not speculation; rather, it was whether, under this Court's decision in Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963), this jury was entitled to credit petitioner's account of how his injuries had occurred.

He also urged that even under New York's generally more restrictive requirements with respect to establishing causation in a negligence case, as well as the approach currently taken by most American courts, the evidence on this issue in this case was in fact sufficient. See, e.g., Feblot v. New York Times Co., 32 N.Y.2d 486, 494-495, 346 N.Y.S.2d 256, 299 N.E.2d 672 (1973)

(evidence sufficient if jury believed plaintiff's account of how she was injured); id., 32 N.Y., at 498-499 (Breitel, J., concurring) (plaintiff not required to establish "the precise cause" of malfunction); Rogers v. Dorchester Associates, 32 N.Y.2d 553, 559-560, 347 N.Y.S.2d 22, 300 N.E.2d 403 (1973); 4 F.V. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986), Section 20.2.

In the Court of Appeals, the dissenting judge, Judge Bellacosa, agreed with petitioner that under this Court's post-Toops precedents it had to be held that the evidence on causation in this case was sufficient (see, e.g., A12-13). He further indicated that he agreed with the petitioner that, even under the relatively more demanding requirements of New York law, this evidence was sufficient to sustain this jury verdict.

Judge Bellacosa pointed out that petitioner's case was stronger than was the petitioner's case in Basham, where this Court had reversed the Court of Appeals and held that the New York courts had improperly invaded the province of the jury in setting aside that FELA jury verdict (A16-17). He also suggested that Toops had to be read in light of this Court's subsequent FELA causation decisions, such as Lavender v. Kurn, with the rule to be distilled from these cases being that a FELA jury verdict could not be based entirely on speculation, but that some speculation was allowable when "'the evidence is such that fair minded [individuals] may draw different inferences'" (A13, quoting Lavender v. Kurn, 327 U.S., at 653; material in brackets added by Judge Bellacosa).

Judge Bellacosa noted that under this Court's controlling precedents special deference was required to be accorded to jury verdicts in FELA cases, and that this also required the sustaining of this jury verdict (A17-19).

On the other hand, the Court of Appeals majority, while it quoted this Court's statement of the standard of proof of causation required in FELA actions as set forth in Rogers and reaffirmed in Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557 (1987) (A2-3), simply ignored this Court's decisions in Basham, Gallick, Schulz, and Lavender v. Kurn. Indeed, it did not even cite any of those decisions. Instead, relying solely upon Toops, it held that the petitioner's evidence was "insufficient as a matter of law, without total speculation . . . to permit the

inference that any negligent act or omission on Conrail's part caused his injuries" (A3).

As was the Appellate Division's opinion, the Court of Appeals' majority opinion was vague as to the actual basis for the court's holding. Thus, while the court stated that this verdict must have been based on "total speculation," it did not explain what it meant by this so conclusory statement. Again, it made no attempt to reconcile its holding and the facts of this case with Basham or the other post-Toops decisions relied upon by the petitioner and the dissenting judge.

In his dissent, Judge Bellacosa characterized what had occurred in the New York appellate courts in this case as an "evident disregard . . . of the controlling Federal standards as they should be applied to this case" (A12).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION IN THIS CASE IS NOT REQUIRED BY THIS COURT'S DECISION IN TOOPS AND IS SQUARELY INCONSISTENT WITH THIS COURT'S POST-TOOPS FELA CAUSATION PRECEDENTS.

In Toops this Court's so broad statement concerning it not being permissible for a FELA finding of causation to be based on jury speculation was in fact unnecessary to that decision. Toops was a death case, where there were no eye-witnesses, and there was no evidence in that case that the employer had in any way been negligent, much less that any such never-established negligence might have caused the decedent's death. Rather, negligence was simply assumed arguendo. See 281 U.S., at 355. In short, this statement here so relied upon by the New York appellate courts may fairly be considered to have been nothing more than dicta, albeit Supreme Court dicta.

Compare Kastigar v. United States, 406 U.S. 441, 454-455 (1972), reh. denied, 408 U.S. 931 (1972) (broad language unnecessary to court's decision cannot be considered binding authority).

Moreover, in considering what, if any, precedential effect this statement in Toops is or may have been entitled to, it is necessary to consider the entire sentence in which this statement appears, wherein this Court critically qualified this otherwise so broad statement, viz: "The jury may not be permitted to speculate as to [the] cause [of the injury] and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer" (281 U.S. at 354-55; emphasis added).

Also, this statement in Toops has to be considered in light of this Court's decision in New York Central R. Co. v. Marcone, 281 U.S. 345 (1930), decided the same day as Toops, and likewise authored by Justice Stone. In Marcone there were no eyewitnesses to the accident which caused that railroad worker's death, and, clearly, in that case a large measure of speculation must have been required for that jury to have concluded that the decedent's death had been caused by the railroad's negligence. Yet, this Court unanimously held that there was in that case sufficient evidence for that jury to have concluded that the decedent's death had been caused by his employer's negligence. See 281 U.S., at 349-350.

Even more to the point, even assuming that this statement in Toops ever was entitled to be considered as a

binding precedent of this Court, it plainly no longer can be accorded that status. It has in fact, if not by name, been effectively overruled by this Court's post-Toops decisions in cases such as Gallick, Webb, Schulz, and Lavender v. Kurn, all specifically recognizing that it is no proper objection to a FELA jury's finding of causation that such finding may have been based in some measure on speculation, all simply ignoring this language in Toops, and all standing squarely for the proposition that the evidence in this case was as a matter of law entirely sufficient. See, e.g., Gallick, 372 U.S., at 113-117, reviewing and reaffirming this Court's post-Toops causation and sufficiency of evidence precedents, and never once even mentioning Toops. See also Webb, 352 U.S., at 512 n. 6.

Moreover, it bears noting that the last time Toops was cited by this Court was in 1944, in Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, at 33, reh. denied 321 U.S. 802, where this Court had rejected the employer's claim that the evidence as to causation was insufficient. Also, Toops must today be considered in light of what this Court said in Gallick, Rogers, Schulz, Lavender v. Kurn, and Tennant as to the deference which must be accorded to the role of the jury in FELA cases. In addition, under this Court's decision in Basham it is plain that petitioner was not required to establish the precise mechanical defect or condition that caused this car to malfunction.

Finally, as Judge Bellacosa recognized, properly analyzed, this case does not turn on excessive jury specu-

lation. Rather, what it turns on is solely whether this jury was entitled to credit the petitioner's testimony concerning how his injury had occurred, which under Basham it most assuredly was. See 372 U.S., at 700-701. See also Davis v. Baltimore & Ohio R. Co., 379 U.S. 671 (1965); cf. Edmonson v. Leesville Concrete Co., ___ U.S. ___ , ____, 114 L.Ed.2d 660, 676, 111 S.Ct. 2077, 2085 (1991) (citing Basham for proposition that the jury is "the principal fact finder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict").

Of course, with this statement in Toops never having been specifically repudiated by this Court, it was required to be treated with at least some deference by the New York courts. See, e.g., Rodriquez de Quijas v. Shearson/American

Express, Inc., 490 U.S. 477, 484 (1989) (lower courts required to follow "directly controlling" -- albeit undermined -- Supreme Court precedent); id., at 486-87 (Stevens, J., dissenting). See also Howlett v. Rose, 496 U.S. 356, 376 (1990) (noting that a state court entertaining an action under 42 U.S.C. Section 1983 must adhere to this Court's interpretation of that statute).

But, plainly, it is submitted, this language from Toops here so relied upon by the New York appellate courts cannot properly be considered a "directly controlling" precedent dispositive of this case. That would be to altogether distort and pervert the doctrine of stare decisis and the "principle of obedience" (see 1B Moore's Federal Practice, par. 0.402[1], p. 12 n.15).

What has occurred here is not "obedience" to the principles of stare decisis and federal supremacy. Rather, it is, in reality, defiance of those principles. It ignores the cardinal principle of stare decisis that it is this Court's most recent decisions which must be accepted as controlling. It ignores what were the actual facts and the full language of Toops, as well as this Court's contemporaneous decision in New York Central v. Marcone. It renders meaningless this Court's repeated admonitions in cases such as Tennant, Lavender v. Kurn, Schulz, Gallick and Basham that the courts may not invade the province of the jury in FELA cases, but, instead, must allow the jury to determine credibility, weigh the evidence and decide the facts. And, of course, it ignores this Court's express pronounce-

ments that it is no proper objection to a jury finding of causation in a FELA case that such finding may in some measure have been based on speculation.

In short, this case is not controlled by Toops. And, to the extent that in this case the New York appellate courts may either have been misled in relying upon this language from Toops or have attempted to avoid the effect of this Court's later, and here controlling, decisions by relying on this long-ignored and effectively long-since overruled statement, this can only serve to underscore the need for this Court to grant the writ of certiorari in this case.

In this case, Conrail's negligence was more than amply established, and no excessive or impermissible speculation was required for this jury to have concluded that that negligence caused or

contributed to the petitioner's injury. Compare, for example, Marcone, 281 U.S. 345. All that this required was that the jury believe petitioner's account of how he was injured. Basham, 372 U.S. 699.

2. THE WRIT OF CERTIORARI SHOULD BE ISSUED TO VINDICATE AND PROTECT THE SOLE AND SUPREME AUTHORITY OF THIS COURT TO DEFINITIVELY CONSTRUE THIS STATUTE.

In this case the Court of Appeals majority went through the ritual of rendering homage to this Court's authority to definitively interpret this federal statute by citing and professing to be following this Court's decisions in Rogers and Buell, as well as Toops. However, so profound was that court's silence with respect to this Court's post-Toops precedents speaking directly to the issue of the sufficiency of evidence of causation presented by this case that the conclusion is inescapable

that in fact what occurred in this case was, as Judge Bellacosa suggested, the deliberate denial of a federal right, in "evident disregard" of this Court's controlling precedents (A12), under the cover, the mere pretext, of following Toops. Compare Howlett v. Rose, 496 U.S., at 366, where this Court pointed out, in discussing the issue of "adequate state ground" for a state court's not enforcing a federal right, that it is within the province of this Court "to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair and substantial support."

Here, there is presented the very same cause for concern that a pretextual

ground of decision may have been employed by a state court in order to defeat federal rights, with here the only difference from the situation described in Howlett being that here what was done was to put forward a purported federal ground of decision that was "without any fair and substantial support." Id.

Moreover, what this case presents, or at least seems clearly to present, is the plainly intolerable spectacle of the New York Court of Appeals not merely defying this Court's authority, but also apparently mocking that authority -- by its purporting to follow this Court's precedents, while at the same time it trifled with its obligation to carefully examine and take seriously all of this Court's relevant precedents and to undertake responsibly to determine which of those precedents must be followed.

The New York Court of Appeals knows full well what the doctrine of stare decisis requires by way of carefully examining precedents. See, e.g., Flanagan v. Prudential-Bache Securities, Inc., 67 N.Y.2d 500, 504 N.Y.S.2d 82, 495 N.E.2d 345, cert. denied, 479 U.S. 931 (1986); People v. Hobson, 39 N.Y. 2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976). This is something which that court knows it must do in a case controlled by federal law. See, e.g., Singer v. Jefferies & Co., 78 N.Y.2d 76, 571 N.Y.S.2d 680, 575 N.E.2d 98 (1991). Yet, in this case the Court of Appeals majority did not do what it was required to do by way of following this Court's controlling precedents. Instead, here, it plainly appears, it chose to disregard this Court's supreme authority. Compare General Atomic Co. v. Felter, 436 U.S. 493 (1978).

3. THE WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO GIVE EFFECT TO THE INTENT OF CONGRESS AS THAT INTENT HAS BEEN EXPRESSED IN THE FEDERAL EMPLOYERS' LIABILITY ACT AND TO DO JUSTICE TO THE PETITIONER.

This Court's post-Toops causation and sufficiency of evidence precedents, as those precedents have evolved through decisions such as Lavender v. Kurn, Schulz, Rogers, Gallick, and Basham, are all supported by both the broad and plain language of this statute and its legislative history. See Rogers, 352 U.S., at 506-507. These controlling FELA precedents reflect not merely this statute's broad language, but also its remedial purpose. See Buell, 480 U.S., at 561-562. In addition, they represent what this Court has clearly and repeatedly stated Congress intended in enacting this legislation. This construction of this statute has for decades now, in case

after case, been acquiesced in by Congress as representing how this statute should be construed. Accordingly, it must be accepted as representing not merely this Court's view of the original intent of Congress, but also the continuing will of Congress. See Hilton v. South Carolina Pub. Ry. Commm., 502 U.S. ___, ___, 116 L.Ed.2d 560, 569-570, 112 S.Ct. 560 (1991); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, reh. denied 434 U.S. 881 (1977); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-408 (1932) (Brandeis, J., concurring).

In the face of that clear intent of Congress, the task of the courts is to give effect to that intent. See, e.g., Negonsott v. Samuels, ___ U.S. ___, ___, ___ L.Ed.2d ___, ___, 113 S.Ct. 1119, 1122-1123 (1993); Griffin v. Oceanic

Contractors, Inc., 458 U.S. 564, 571 (1982).

What the New York appellate courts have done in this case flies squarely in the face of that intent. It is an affront not only to this Court, but also to the Congress. It is, by virtue of this, a plain violation of the principle of Federal Supremacy. See U. S. Const., Art. VI, Clause 2; Howlett v. Rose, 496 U.S. 356; Arnold v. Panhandle & Santa Fe R. Co., 353 U.S. 360 (1957); Testa v. Katt, 330 U.S. 386 (1947); Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941); Mondou v. New York, N.H.& H.R. Co., 223 U.S. 1 (1912). Cf. Hilton v. South Carolina Pub. Ry. Comm., 502 U.S., at ___, 116 L.Ed.2d, at 572, 112 S.Ct., at 566.

It is, in addition, altogether unfair and unjust to this injured railroad employee. Also, as Judge

Bellacosa's dissent suggests, this decision by the New York Court of Appeals appears to impose upon a FELA plaintiff a greater burden of proof than does New York law generally in a negligence action (see A15-16) -- which can only be interpreted as impermissible discrimination against those whom this federal legislation was intended to benefit and protect.

4. IF THIS ASPECT OF TOOPS DOES STILL HAVE FORCE AS PRECEDENT, THEN THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR TO THE LOWER COURTS WHAT EFFECT MUST BE GIVEN TO THIS PRECEDENT.

As noted, the last time this Court cited Toops was in 1944, a half-century ago. No federal court of appeals regards this statement from Toops as declaratory of current FELA law. Nor, apart from this case, is there any recent state highest court decision of which we are aware which has so read and applied

Toops. But cf., Chapman v. Union Pacific R. Co., 237 Neb. 617, 467 N.W.2d 388 (1991) (citing Toops in holding that plaintiff failed to sufficiently establish that the absence of a seat belt had caused his injury; plaintiff had failed to produce expert medical evidence linking the condition complained of to the accident).

Now, however, we have the New York Court of Appeals, historically considered a court of national stature, citing and relying upon, indeed placing overwhelming reliance upon, this statement in Toops as a currently controlling FELA sufficiency of evidence precedent.

Accordingly, it can now undoubtedly be expected that very shortly defense counsel in FELA and Jones Act cases nationally will as a matter of course be urging courts to dismiss complaints based

on Toops (as Toops has been read and applied in this case), and those courts will now have to carefully consider what effect should be accorded to Toops in cases where a defendant can muster any sort of argument that a jury verdict in the plaintiff's favor would have to be based on speculation.

Unless this Court addresses this issue, this situation is certain to breed confusion, and to cause delay in the administration of justice. It will, at the least, cause confusion and delay in FELA actions brought in the state courts in New York. Likewise, it will discourage FELA plaintiffs from bringing their actions in the New York state courts, notwithstanding they are fully entitled to sue in those courts. See, e.g., Hilton v. South Carolina Pub. Ry. Comm., 502 U.S. ___, 116 L.Ed.2d 560, 112 S.Ct. 560.

Also, as long as this decision stands uncorrected by this Court, this may well discourage FELA plaintiffs in other states from resorting to the courts of their states, which would only add to the already great burdens on our federal district courts. Also, if this decision is allowed to stand uncorrected by this Court, this may well embolden courts in other states to believe that this is an area of the law in which this Court is not concerned with securing compliance with its prior decisions and vindicating the intent of Congress as expressed in this legislation.

And, it is submitted, all of these considerations argue most strongly for this Court's granting certiorari in this case. Compare Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 73 (1944)

(Frankfurter, J., concurring) (indicating that it "is most desirable . . . that the law should not be cloudy and confused" in this field).

If this statement in Toops has today any precedential force beyond what this Court has said with respect to "speculation" and the role of the jury in cases such as Basham, Gallick, Rogers, and Lavender v. Kurn, then, it is submitted, in fairness to FELA litigants and the lower courts, this Court should speak clearly and directly to this issue. It should tell us what Toops now means.

Likewise, if this statement in Toops may now properly be considered as having no precedential force, this Court should make it clear that this is so. This statement in Toops is this Court's creation. And, properly, this Court is the body which should say what is its

current status. Cf. Rodriguez de Quijas v. Shearson/American Express, 490 U.S., at 484. Albeit Toops is dated and its so broad statement concerning speculation has been effectively overruled, only this Court can finally and absolutely, definitively, say that this is so. Id.

CONCLUSION

For these reasons, this Court should grant a writ of certiorari to review the decision and order of the New York Court of Appeals in this case.

Respectfully submitted,

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March 29, 1993

APPENDIX

DECISION AND ORDER OF NEW YORK COURT OF APPEALS DATED AND ENTERED DECEMBER 21, 1992

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 275

Thomas W. Curley,
Appellant,
v.

Consolidated Rail Corporation,
Respondent,
v.

Excelsior Truck Leasing Company,
Third-Party Respondent.

L. Kevin Sheridan, for appellant.
Lawrence R. Bailey, Jr., for respondent.
Terrence P. O'Reilly, for third-party respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed with costs.

Plaintiff commenced an action against his employer Consolidated Rail

Corp. ("Conrail"), pursuant to the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.), to recover damages for injuries sustained while he was driving one of Conrail's vehicles. After a jury trial, a judgment and verdict was rendered in plaintiff's favor.

The Appellate Division modified, on the law, vacating the judgment and verdict and dismissing the complaint, on the ground that plaintiff had not satisfied the standard of review applicable to actions brought under the Federal Employers' Liability Act ("FELA"), i.e., "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (Rogers v Missouri Pac. R.R. Co., 352 US

500, 506 [1957], reh denied 353 US 943 [1957]; Atchison, Topeka & Santa Fe Ry. Co. v Buell, 480 US 557, 561-562 [1987]).

Plaintiff's evidence consists primarily of the testimony that the vehicle he was driving at the time of the accident had been frequently complained about and repaired, had been in service longer than the normal life span of these vehicles, and had been driven many thousands of miles. Even under the "low and liberal" standard applicable to FELA cases (Smith v National R.R. Passenger Corp., 856 F2d 467, 469 [2d Cir 1988], plaintiff's evidence is insufficient as a matter of law, without total speculation (Atchison, Topeka & Santa Fe Ry. Co. v Toops, supra, at 355), to permit the inference that any negligent act or omission on Conrail's part caused his injuries.

The dissent's position to the contrary is unpersuasive for several reasons. First, there is nothing in the Appellate Division's ruling to indicate that it departed from existing law and limited its review of the evidence to the plaintiff's proofs. Second, the additional evidence submitted by defendant Conrail does not support plaintiff's case. For instance, the testimony of Conrail's expert, so heavily relied upon by the dissent, refers to the effects on police vehicles of their increased use. There is no relationship between that testimony and the car in which plaintiff was injured in particular. Further, the cross-examination testimony of Conrail's service manager is not supportive of plaintiff's case. Finally, the dissent's enumeration of more examples of

"possible" negligence on Conrail's part does not add anything but mere speculation to the proof that Conrail caused plaintiff's injuries.

BELLACOSA, J. (dissenting):

I respectfully dissent and vote to reverse the order of the Appellate Division and reinstate the judgment of Supreme Court, predicated on a jury verdict in favor of the plaintiff for $983,000.

This Federal Employees Liability Act ("FELA") action to recover for permanently disabling back injuries sustained while plaintiff was employed as a police officer by the defendant Conrail is governed exclusively by well-settled Federal law principles (see, Basham v Pennsylvania R.R. Co., 372 US 699, 700-701, revg 11 NY2d 991, citing Lavender v Kurn, 327 US 645). Additionally, under

New York precepts of appellate review, the evidence presented to the factfinder, usually a jury, at trial must be construed in the light most favorable to plaintiff (Lane-Real Estate Dept. Store v Lawlet Corp., 28 NY2d 36, 42; see also, Cohen v Hallmark Cards, 45 NY2d 493).

On March 6, 1984, plaintiff was driving a Conrail company car, #360, at approximately 40 to 45 m.p.h., when the car came to an abrupt stop, skidded and threw him forward and across the driver's seat. Car #360 was used on a daily basis by plaintiff and two other police officers on their respective duty shifts. In a typical work day, hundreds of miles would be travelled in the car. At the time of plaintiff's accident, car #360 had been driven at least 164,000, and more likely, 264,000, miles.

A Ford Motor Company engineer called

as an expert witness by defendant Conrail stated on cross-examination that due to the additional abuse and stress placed on police cars, 150,000 miles on such cars would be "harder" miles than those accumulated on ordinarily used cars.; also, parts wear out faster than those on non-business used cars with similar mileage. The expert witness also stated that, at the odometer range of car #360, parts would be constantly wearing out and breaking; and that if something had broken off and jammed into the gears or the differential, this would cause a car to slow down or stop abruptly. Plaintiff testified that car #360 had done just that at the time of the accident.

Defendant Conrail also presented testimony of its service manager, who inspected car #360 after the accident. While this witness on direct examination

refuted plaintiff's account of how the accident happened, he acknowledged on cross-examination that he had not inspected either the transmission or the emergency brake cable, and that it was possible that a malfunction in either of these parts could have caused the wheels to lock up, as plaintiff described the happening and cause of the accident.

This testimony, in conjunction with the documentary evidence, which established that car #360 needed repairs frequently and was the subject of complaints on numerous occasions by all three of the officers who drove it, supports the inference that car #360 was subject to the degree of wear and deterioration attributed by defendant's expert witness to police cars at this odometer range. Plaintiff testified that since it had been assigned to West

Haverstraw, the car made several unexplained noises, including "whooshing" and "grinding" sounds, and that each time the vehicle stopped he would hear a "hard clunk".

One of the officers testified that in 1982, when car #360 had approximately 140,000 miles on it, and again in 1983, he experienced the same problem with it that occurred on the date of plaintiff's accident, i.e., the car would come to an abrupt stop and then not be operational for a few minutes. Plaintiff's co-officer added that he complained to his superiors, both orally and through his daily vehicle report sheets. He also mentioned the trouble to plaintiff and to the third co-officer operator. Most relevantly, this witness complained about the performance of, and trouble with, car #360 on March 5, 1984, the day before the

accident, with respect to the very problem described as the happening of the accident.

Conrail required its officers to report any problems with cars to their supervisors. Plaintiff's problems were noted in his daily vehicle reports, as were those of his co-officers. The supervising lieutenant at the time of the accident testified at trial as a witness for Conrail that it was his responsibility to oversee the maintenance of the cars. He admitted that he did not usually look at the daily vehicle reports because it was not "necessary".

Under traditional appellate review standards, and especially under the strictures governing a FELA jury verdict, courts cannot devalue or disregard substantial portions of testimonial and documentary evidence simply because it

was presented by defendant's witnesses. In any sufficiency of the evidence review situation, appellate courts must consider all the evidence, including that which is presented by or elicited from a defendant (National Bank of North America v Systems Home Improvement, Inc., 69 AD2d 557,562, affd 50 NY2d 814). The Appellate Division in this case alluded to only the evidence presented by the plaintiff and stated that as matter of law "that evidence" was insufficient (178 AD2d 318, 320). The appellate court evidently failed to consider the evidence adduced on defendant's case which, ironically, happened to be in considerable aid of plaintiff's case. This failure to reflect adherence to the correct and complete standard of review supports a reversal in this case.

More compelling, still, for reversal

is the evident disregard by the reviewing appellate courts of the governing Federal standards as they should be applied in this case. Under Federal law, a FELA case must be sent to the jury -- and its verdict must be accorded a unique level of deference --when the plaintiff has presented proof, which may be entirely circumstantial, "from which the jury may with reason" infer that the "negligence of the employer played any part, however small, in the injury or death which is the subject of the suit" (Rogers v Missouri Pacific R.R. Co. 352 US 500, 508 [emphasis added] [citation omitted]). That "low and liberal" formula -- a filament-thin standard among the slightest known to the law, short of insurer-type strict liability -- is the exclusive governing standard (Smith v National R.R. Passenger Corp., 856 F2d

467, 469, quoting Diebold v Moore McCormack Bulk Transp. Lines Inc., 805 F2d 55. 58).

Notably, A.T. & S. F. Railway Co. v Toops (281 US 351) does not lend support to the Appellate Division's reversal of this jury verdict. Examined in the context of more refined governing principles and precedents, Toops merely stands for the proposition that a jury verdict in a FELA case may not be based entirely on speculation (id., at 354-355). The nuance is that a verdict may involve some speculation when "the evidence is such that fair minded [individuals] may draw different inferences" (Lavender v Kurn, 327 US 645, supra, at 653). Thus, speculation is essentially irrelevant and not dispositive, as long as it does not displace probative facts and permissible

inferences drawn from evidentiary facts (Tennant v Peoria & P.U.R. Co., 321 US 29, 32-33, rehrg denied 321 US 802). In both Lavender and the instant case, there was circumstantial evidence to support the plaintiff's theory as to the cause of the injury and the negligence of the employer (see, Lavender v Kurn, 327 US 645, supra). They thus differ materially from Toops, where there was no proof of any kind and only speculation.

In the instant case, plaintiff offered, as a layperson driver, direct evidence of what happened. On this base, complemented by defendant's significant additional expert and documentary proof and plaintiff's evidence of frequent repairs and complaints, plaintiff built the inference that the employer was negligent. The employer either failed to seek or locate the source of the problem

with car #360, or neglected to take car #360 out of service when the employee-drivers' complaints could not be rectified. Under the slim minimum requirements of Federal law, the jury is also allowed to infer negligence solely from the failure of the employer's supervisor to review the daily vehicle reports in which operator-employees had documented the persistent problems with car #360 -- the very types of things that happened in the pertinent accident. The fact that these inferences of negligence may, as the majority accentuates, include some degree of speculation, should not be fatal to plaintiff's case, because the inferences are in significant part supported by the whole of the proofs at trial (see, Rogers v Missouri Pacific R. R. Co., 352 US 500, supra, at 508). Even under the relatively more demanding

review requirements of New York in traditional negligence cases, the evidence in this case was sufficient to sustain the jury's verdict (see, Cohen v Hallmark Cards, 45 NY2d 493, supra; see also, Noseworthy v City of New York, 298 NY 76, 79).

Significantly, Basham v Pennsylvania R. Co. (372 US 699, revg 11 NY2d 991, supra) points to reversal and reinstatement of the jury verdict in the instant case, the very result decreed by the United Stets Supreme Court in that case. There, the employee was injured when a platform on which he was lying moved, causing him to drop a 100-pound wheel spring onto his left index finger, which was later amputated. Defendant argued that it was impossible for the injury to have occurred as that employee alleged. The employee countered by

introducing evidence of prior complaints in similar, relevant work-related situations. The United States Supreme Court found that the resolution of the conflicting testimony was the province of the jury and reversed our Court for having "invad[ed] the function and province of the jury [by] setting the verdict aside" (Basham v Pennsylvania R. Co., supra, 372 US 699, supra, at 701, revg 11 NY2d 991). At the least, the persistent prior complaints involving car #360, including one the day before the accident at issue, provide , in my view, greater and weightier evidence to support a jury verdict that was present in Basham.

Since a jury verdict in a FELA case may be overturned only "where there is a complete absence of probative facts to

support" the verdict (Lavender v Kurn, 327 US 645, 653, supra; see also, Tennant v Peoria & P.U.R. Co., 321 US 29, 35, supra, rehg denied 321 US 802; Basham v Pennsylvania R. Co., supra), no justification is presented for the appellate courts of this State again to invade and overturn the jury's correct resolution of this case. Finally, in noting that so little is required to sustain a FELA verdict, I am puzzled as to how the Court can justify the result on this record. Therefore, I vote to reverse and reinstate the judgment in plaintiff's favor based on the jury verdict after a trial thoroughly fought out on both sides.

* * * * * * * * * * * *

Order affirmed, with costs, in a memorandum. Acting Chief Judge Simons and Judges Kaye, Titone, Hancock and Smith concur. Judge Bellacosa dissents and votes to reverse in an opinion.

Decided December 21, 1992

REMITTITUR OF THE NEW YORK COURT OF APPEALS DATED DECEMBER 21, 1993

STATE OF NEW YORK
COURT OF APPEALS

The Hon. Richard D. Simons, Acting
Chief Judge, Presiding

1 No. 275

Thomas W. Curley,
Appellant,
v.

Consolidated Rail Corporation,
Respondent,
v.

Excelsior Truck Leasing Company,
Third-Party Respondent.

The appellant in the above entitled appeal appeared by Sable, Gold & Dinhofer, P.C.; the respondent appeared by Walker & Bailey, Esqs.; and the third-party respondent by Foley Hickey Gilbert & O'Reilly.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum.

Acting Chief Judge Simons and Judges Kaye, Titone, Hancock and Smith concur. Judge Bellacosa dissents and votes to reverse in an opinion.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/_____

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, New York, December 21, 1993

DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT ENTERED DECEMBER 24, 1991

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST DEPARTMENT

Murphy, P.J., Carro, Rosenberger, Wallach, Ross, JJ.

43935 Thomas W. Curley,
Plaintiff-Respondent,

-against-

Consolidated Rail Corporation,
Defendant-Appellant,

Consolidated Rail Corporation,
Third-Party Plaintiff-Appellant,

-against-

Excelsior Truck Leasing Company,
Third-Party Defendant-Respondent.

Judgment, Supreme Court, New York County (Hugh Gilbert, J., and a jury), entered July 25, 1990, in favor of plaintiff and against defendant in the sum of $989,058.17, and dismissed the

Third-party complaint, is modified, on the law, to the extent of vacating the judgment and verdict in favor of the plaintiff against defendant, and dismissing the complaint, and otherwise affirmed, without costs.

Since 1978, Mr. Thomas W. Curley (Officer Curley) had been employed by Consolidated Rail Corporation (Conrail) as a police officer, and in March 1984, he was assigned to Conrail's police station located at West Haverstraw, New York, where he worked the 4:00 p.m. to midnight tour.

On March 6, 1984, at approximately 9:50 p.m., while on routine motor patrol, in Car 360, Office Curley was driving, at a speed of between 40 and 45 miles per hour, south on Route 9W from Bear Mountain. Suddenly, as he was proceeding down a slight incline, the vehicle

abruptly stopped, skidded on the pavement, throwing him forward and across the driver's seat. As a result of the incident, Officer Curley alleges he suffered injuries to his back.

By summons and complaint, in August 1984, Officer Curley (plaintiff) commenced, pursuant to the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq), an action against Conrail (defendant) to recover damages for his injuries, in the Supreme Court, New York County. Thereafter, since defendant leased Car 360, which was 1981 Ford LTD, from Excelsior Truck Leasing Company (Excelsior), it commenced a third-party action against Excelsior and the Ford Motor Company (Ford). Prior to trial, defendant discontinued the third-party action against Ford, with prejudice.

A jury trial resulted in a verdict

in favor of the plaintiff against the defendant in the sum of $989,058.17, and in favor of the third-party defendant Excelsior on the third-party claim. Defendant appeals.

Since the plaintiff brought the instant action under the Federal Employers' Liability Act (FELA), "the proper standard of review is that which has been developed in FELA cases and not those applied in the usual common-law negligence actions..." (Richards v So. Buffalo Ry, 54 AD2d 310, 311 (1976)).

Repeatedly, the United States Supreme Court has held that under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought..." (Rogers v Missouri

Pacific R. Co., 352 U.S. 500, 506 (1956), rehearing denied 353 U.S. 943 (1957)).

While "the standard of causation in an FELA action is a 'low and liberal ' one..." (Smith v National R.R. Passenger Corp., 856 F.2d 467, 469 (2d Cir. 1988)), the United States Supreme Court, in A. T. & S. F. Ry. Co. v Toops, 281 U.S. 351, 354-355 (1930), has held unequivocally that a jury in a FELA case is not to engage in speculation in order to determine whether the negligence of the employer caused the injury. Specifically, that Court stated "[b]ut proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case

must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer... [citations omitted]..." (id.) [material in brackets added]. Further, the Court of Appeals has stated "if there is any principle of law that is too well settled to require extensive citation of authority, it is that a jury finding based on speculation is a nullity (Lahr v Tirrill, 274 N.Y. 112, 117)..." (Feblot v New York Times Co., 32 NY2d 486, 494 (1973)).

Our examination of the trial transcript indicates that plaintiff's evidence of causation came from his own testimony, that of Conrail Police Officer James Libruk (Office Libruk), and the deposition testimony of Conrail Police

Officer Douglas Mendik (Officer Mendik). While plaintiff worked the 4:00 p.m. to midnight tour, Officer Libruk worked the midnight to 8:00 a.m. tour, and Officer Mendik worked the 8:00 a.m. to 4:00 p.m. tour. During their tours, each of the officers drove Car 360.

Officers Libruk and Mendik, as well as the plaintiff, testified that Car 360 was frequently being repaired, and, from time to time, all of them had experienced mechanical difficulties in operating that vehicle, and had complained about its performance. Further, plaintiff testified that, based upon information he received from an unnamed union representative, a police vehicle like Car 360 is kept in service between eighteen months and two years. Office Libruk testified that, by late 1982, Car 360 had been driven approximately 140,000 mile,

and Officer Mendik stated that he believed that the odometer on Car 360 had been rolled over twice.

The plaintiff was unable to give any specific reason, other than speculation, for the cause of the alleged accident, since he testified, on direct examination, that, before Car 360 abruptly stopped, he "didn't hear anything or feel anything. I was very relaxed...[and] I believe the wheels locked on me because I did skid. The car did skid...I felt it and I heard it..." (see, Trial Transcript (TT), at 140-141). Further, Plaintiff admitted, during cross-examination, that, after the accident and before the tow truck arrived, he believes he moved Car 360 forward and backward without any apparent difficulty (see, TT, at 361).

Applying the legal authority, supra.

to the facts of the instant case, we find that the plaintiff's only evidence, unsupported by any expert testimony, indicating that defendant's negligence caused his accident, consists of his allegations that the subject vehicle had been frequently repaired, complained about, was more than eighteen months old, and had been driven thousands of miles. We further find that evidence insufficient as a matter of law, without speculation, to permit the jury to reasonably draw the inference "that the injury suffered was caused by the negligent act of the employer..." (A. T. & S. F. Ry. Co. v Toops, supra). In reaching our conclusion, we have given the plaintiff "the benefit of every reasonable inference which can reasonably be drawn from that evidence..." (Hylick v Halweil, 112 AD2d 400 (1985)).

In view of our determination that the plaintiff did not make out a prima facie case, as a matter of law, we do not reach the other contentions of error made by defendant.

At the close of the plaintiff's case, the defendant moved to dismiss the complaint "on the ground the plaintiff... failed to make out a prima facie case on the issue of liability both in terms of negligence and in terms of proximate cause...", and the Trial Court, after hearing argument, denied the motion, "without prejudice...to any post judgment or verdict motions which may be appropriate" (see, TT, at 733-741). Thereafter, at the close of trial, defendant moved to set aside the verdict and dismiss the complaint on the ground that plaintiff had "[f]ailed as a matter of law to prove that the defendant...was

negligent...", and again, the Trial Court, after hearing argument, denied "the motion with exception..." (see, TT, at 1377-1379). We note that defendant's notice of appeal indicates that the "appeal is taken from each and every part of said judgment as well as the whole thereof" (see, Record on Appeal, at 4a-5a).

Since defendant took timely exception to the denial of the motion to set aside the verdict and dismiss the complaint, we find that issue has been preserved for our review (CPLR Sections 4017, 5501). Although defendant has not specifically requested on appeal the relief that the complaint be dismissed, we find that we can grant such relief, based upon our "power to search the record and award summary judgment..." (Merritt Hill v Windy Hgts., 61 NY2d 106,

111 (1984)). Further, the Court of Appeals has held that "[i]t is, of course, axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party..." (Hecht v City of New York, 60 NY2d 57, 62 (1983)). [material in brackets added].

Accordingly, we modify to the extent of vacating the judgment and verdict in favor of the plaintiff against the defendant, and dismiss the complaint.

All concur except Wallach, J., who dissents in a memorandum as follows:

WALLACH, J. (dissenting):

While I agree that this record warrants reversal of the judgment in plaintiff's favor, I part company with the majority insofar as they would dismiss the action instead of remanding

it for a new trial. Neither in its brief, nor even in oral argument, has defendant urged dismissal of the complaint. True, defendant did move for that relief twice during trial, which is simply to say that the point was technically preserved. But, preservation of error in the course of trial is one thing, and presentation of that error at the appellate level is quite another. It is undisputed that, on this appeal, defendant abandoned any dismissal argument, seeking only a reversal for new trial based upon other trial errors. For us to dictate, sua sponte, the total extinction of this action -- relief which defendant never sought on appeal -- is manifestly unfair to the plaintiff, especially when we do so without the slightest advance notice to him. This court should not reach beyond the scope

of the appeal as framed by defendant-appellant, and upon which plaintiff has justifiably relied in formulating his appellate response. To pull the whole rug out from under plaintiff in this fashion is tantamount to a denial of due process.

Furthermore, although as a formal matter the majority purports to rest its dismissal on the law alone, its discussion of the case clearly indicates that plaintiff presented a discernible quantum of evidence on every element of his cause of action, and all this in the context of an FELA claim where the acknowledged test is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (Rodgers v. Missouri Pacific R. Co., 352 U.S.> 500, 506 [underscoring added].)

Thus formalities aside, the actuality here is that the reversal rests not only on the law but also upon negative appraisal of the weight of the evidence, and therefore is based upon "the facts" as well. Therefore, outright dismissal exceeds our authority. In Lane--The Real Estate Department Store v. Lawlet Corp. (28 NY2d 36), the Appellate Division had reversed a judgment after jury trial in the plaintiff's favor (as the majority is really doing here), "on the law and the facts" (33 AD2d 924). The Court of Appeals ruled that in a jury case the Appellate Division lacks the power to reverse on the facts (even as an alternative), and at the same time to dismiss the complaint. Under such circumstances, the Appellate Division "must order a new trial" (28 NY2d at 45), and we should do so here.

In sum, the Appellate Division can reverse on the law and dismiss the complaint only if there was no evidence at trial in the plaintiff's favor upon an essential element of his cause of action (Feinberg v. Saks & Co., 56 NY2d 206, 211). Once a jury verdict is to be set aside as "against the weight of the evidence" (as defendant urged herein), a new trial is necessary (Martin v. City of Albany, 42 NY2d 13), and the Appellate Division has so held on numerous occasions (Barker v. Bice, 87 AD2d 908; Parksville Mobile Modular v. Fabricant, 73 AD2d 595, 600, app dsmd 49 NY2d 801; Evan v. Wilson, 70 AD2d 895; Ellis Hospital v. Little, 65 AD2d 644, 646, mot to dsms app qtd 47 NY2d 951). Our decision in Labriola v. City of New York (129 AD2d 505, 506, lv denied 70 NY2d 604) is not to the contrary. Our

affirmance of dismissal by the trial court there rested on plaintiff's failure to plead, and to offer any evidence in support of, a special duty to him undertaken by the defendant municipality, an essential element of his cause of action.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: December 24, 1991

s/Francis X. Galdi

JUDGMENT OF SUPREME COURT, NEW YORK COUNTY, ENTERED JULY 25, 1990

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THOMAS W. CURLEY,
Plaintiff,

-against-

Index No.
25656/84

CONSOLIDATED RAIL CORPORATION,
Defendant,

CONSOLIDATED RAIL CORPORATION,
Third-Party Plaintiff,

-against-

EXCELSIOR TRUCK LEASING COMPANY,
Third-Party Defendant.

The above entitled action, having duly come on to be heard before the Honorable Hugh Gilbert and duly constituted jury of six, at an Individual Assignment Part 44 of this Court, and the case having been tried on the 20th, 21st, 22nd, 25th, 26th, 27th, 28th, 29th days of June and the 2nd and 3rd days of July 1990, and the plaintiff having been

represented by Fredric M. Gold, Esq., of the office of Jesse C. Sable, P. C., the defendant having been represented by Lawrence Bailey, Esq., of Walker & Bailey, Esqs., and the Third Party Defendant having been represented by William Kennedy, Esq., and the jury having duly deliberated and found the verdict on July 5th, 1990 in favor of the plaintiff Thomas W. Curley, and against the defendant Consolidated Rail Corporation, and in favor of the Third Party defendant, Excelsior Truck Leasing Company, and against the Third Party plaintiff, Consolidated Rail Corporation, and it is .

NOW, on motion of Jesse C. Sable, the attorney for the plaintiff, Thomas W. Curley,

ADJUDGED that plaintiff THOMAS W. CURLEY, residing at M.D. 5, Oak Drive,

Monroe, NY 10950, do recover against the defendant CONSOLIDATED RAIL CORPORATION, 744 Broad Street, Newark, NJ 07102, the sum of $983,000.00, together with interest thereon from July 5, 1990, at the rate of 9% per annum, in the sum of $4,847.67 together with costs and disbursements of this action in the sum of $1,210.50, in the present sum of $989,058.17 and that plaintiff have execution therefore, and it is

FURTHER ADJUDGED that the Third Party defendant, EXCELSIOR TRUCK LEASING COMPANY, residing at 1100 Ridge Pike, Conshohoken, PA 19428, do recover of the Third Party plaintiff, CONSOLIDATED RAIL CORPORATION, 744 Broad Street, Newark. NJ 07102, costs and disbursements of this action in the sum of $950.00, and the

Third Party defendant have execution therefore,

Norman Goodman
CLERK

FILED JULY 25, 1990, COUNTY CLERK'S OFFICE, NEW YORK

ORDER OF NEW YORK COURT OF APPEALS ENTERED FEBRUARY 25, 1993, DENYING REARGUMENT

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of February A.D. 1993

Present, Hon. Richard D. Simons, Acting Chief Judge, Presiding

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Mo. No. 117

Thomas W. Curley,
Appellant,
v.

Consolidated Rail Corporation,
Respondent,
v.

Excelsior Truck Leasing Company,
Third-Party Respondent.

A motion for reargument to the Court of Appeals having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/_____
Donald M. Sheraw
Clerk of the Court

ORDER OF APPELLATE DIVISION, FIRST DEPARTMENT ENTERED MARCH 24, 1992, GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 24, 1992

Present - Hon. Francis T. Murphy
Presiding Justice
John Carro
Ernst H. Rosenberger
Richard W. Wallach
David Ross
Justices

Thomas W. Curley,
Plaintiff-Respondent,

-against- M-331

Consolidated Rail Corporation,
Defendant-Appellant,

Consolidated Rail Corporation,
Third-Party Plaintiff-
Appellant,

-against-

Excelsior Truck Leasing Company,
Third-Party Defendant-
Respondent.

Plaintiff-respondent having moved for reargument of, or in the alternative for leave to appeal to the Court of Appeals from, the decisions and order (Appeal No. 43958) of this Court entered on December 24, 1991,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that, wherein it seeks reargument, the motion be and hereby is denied, and is granted wherein leave to appeal is sought; and this Court, pursuant to CPLR 5713, states that questions of law have arisen which ought to be reviewed by the Court of Appeals.

ENTER:

s/Francis X. Galdi

Clerk

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT ENTERED NOVEMBER 9, 1989

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 24, 1992

Present: Milonas, J.P., Rosenberger, Ellerin, Rubin, JJ.

Thomas W. Curley,
Plaintiff-Respondent,

-against-

Consolidated Rail Corporation,
Defendant-Appellant,

Consolidated Rail Corporation,
Third-Party Plaintiff-Appellant,

-against-

Excelsior Truck Leasing Company,
Third-Party Defendant-Respondent.

Order, Supreme Court, New York

County (Harold Baer, Jr.), entered on June 16, 1989, unanimously affirmed, without costs and without disbursements. We find no abuse of the IAS Court's discretion. No Opinion.

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED JUNE 16, 1989

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Harold Baer, Jr.

Thomas W. Curley,
-against-
Consolidated Rail Corp.

Index No.
25656/89

The following papers read on this motion to dismiss

	Papers Numbered
Notice of Motionon/Order to Show Cause - Affidavits - Exhibits	1-3
Answering Affidavits - Exhibits	4
Replying Affidavits	

Upon the foregoing papers it it ordered that these motions to dismiss under Sec 3404 & cross-motion to restore are resolved as follows: The motion is granted unless the plaintiff's attorney pays to the Client Security Fund $500 & files a note of issue all within 30 days

from the date hereof. The matter will be added to the August trailing trial calendar & there will be a final pre-trial conference on Monday June 26, 1989 should the above conditions be accomplished.

Dated 6/6/89

s/Harold Baer, Jr.

J.S.C.

FILED
JUNE 16,1989
COUNTY CLERK, NEW YORK